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THE FUNCTION OF CONSTITUTIONAL PROVISIONS REQUIRING UNIFORMITY IN TAXATION*

By William L. Matthews, Jr.**

PART III
UNIFORMITY AND SPECIFIC TAX LEGISLATION

CHAPTER IV
UNIFORMITY AND TAX LEGISLATION IN GENERAL

The general and necessarily glittering language one can find in the historical material and the cases to describe the uniformity provisions is interesting and helpful; but it is far more practical to examine their use in determining the constitutionality of specific tax legislation, because an understanding of their function is largely ephemeral when divorced from the findings of a given court on a given tax at a given time. Generalities furnish an essential background and cannot be ignored, but they must be complemented with a consideration of uniformity in relation to its effect on the principal taxes enacted by many jurisdictions during recent years.

The courts exhibit a continuing interest in the problems of constitutional phraseology, scope, and effect when directing their attention to specific statutes. Phraseology seems to give them little trouble since few cases are found where the validity of a tax is resolved on that basis alone. Questions of scope are more difficult, however, for in answering them they must decide if the tax is one on property, and the decision on this point can be the primary ground for finding a statute unconstitutional. It is in the solution of these questions that the labeling process has had such a dominant role and the taxing power of the legislature has been most effectively limited by the judiciary In many cases the nature of the tax is decided before any other issue is considered so that no further decision is necessary If the kind of uniformity required by the constitution is considered inapplicable to the kind of tax involved, the court proceeds to determine the

* This is the second of four articles based on a thesis written in partial fulfillment of requirements for the S.J.D. degree at the University of Michigan Law School. The first article appeared in the November, 1949, issue of the Journal and the others will appear in the next two issues.

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validity of the classifications attempted and the solution of such other points as the provisions of the statute may present. To this extent, the solution of problems in phraseology, scope and effect of the constitutional provisions represent the stages of decision, or sequence of events, as well as the bases for distinctions in kinds of uniformity Most tax legislation survives the initial stage so its character or nature and manner or method must sustain its claim to the respectability afforded by judicial approval. The right of various taxes, measured by these two qualifications, to wear the cloak of constitutional sanction —a garment zealously guarded by the courts—is our immediate concern.

Attempts to distinguish between property taxes and other taxes except by resorting to incidents are illusory if not useless because sooner or later one will find a decision which denies every nice and precise criterion he may choose to advance. Nevertheless, since the uniformity provisions purport on their face, or are construed, to be principally a limitation on property taxation,[109] a finding on this question is essential to the constitutionality of any tax. Similarly, the differences between permissible classifications and unreasonable ones are not conducive to general definition, but as long as the uniformity provisions do not require an absolute rule for all taxes, differences must be found. The most that can be done short of examining all the cases, a manifest impossibility, is to consider those which best illustrate the effect of uniformity on (1) taxes clearly in the nature of property taxes, (2) taxes which may be labeled property or non-property, (3) taxes clearly non-property in nature, and (4) income taxes. The last named seem to have acquired a nature and dignity all their own. In each category assumed the power of the legislature to classify is an integral part of a court's complete decision, and is, therefore, considered in the discussion of each.

[109] For a listing of constitutional provisions by states see Table I, which appeared as an appendix to the first article, 38 Ky. L. J. 69. Lee v. State Tax Commission, 219 Ala. 513, 123 So. 6 (1939); Morris v. State, 40 Ariz. 32, 9 P 2d 404 (1932); Wiseman v. Phillips, 191 Ark. 63, 84 S.W. 2d 91 (1935); People v. McCrear, 34 Cal. 432 (1868); Hughes v. State, 97 Colo. 279, 49 P 2d 1009 (1935); Jacksonville Gas Company v. Lee, 110 Fla. 61, 148 So. 188 (1933); Adams Motor Company v. Cler, 149 Ga. 818, 102 S. E. 440 (1919); Diefendorf v. Gallet, 51 Idaho 619, 10 P 2d (1932); Lutz v. Arnold, 208 Ind. 480, 193 N. E. 840 (1935); State v. Cline, 91 Kan. 416, 137 Pac. 932 (1916); Strater Brothers Tobacco Company v. Commonwealth, 117 Ky. 6104, 78 S.W 871 (1904); Gulf Refining Company v. McFarland, 154 La. 251, 97 So. 433 (1923); Oursler v. Tawes, 178 Md. 471, 13 A. 2d 763 (1940).

CHAPTER V

TAXES CLEARLY IN THE NATURE OF PROPERTY TAXES

SECTION 1.

In General

Due to the many forms the general property tax has taken during the years of its long existence, one might expect the judicial definition of property taxation to be broad and inclusive, but actually, the opposite is true. Of numerous taxes before the courts on the ground that they were property taxes and subject to the constitutional limitations applicable to property taxation, many have been so labeled by particular jurisdictions, but few can be characterized as clearly in the nature of property taxes in the sense that all courts will so construe them. There is marked conflict as to the nature of *ad valorem* taxes on representative intangibles, capital stock taxes, taxes involving the privileged use and ownership of property, income taxes, and many others where the value of property is taken as some measure of the exation made. The name attached to a tax by the legislature is of little consequence in resolving the conflict because the courts on their own initiative inquire as to the nature of the tax, and seem to be little impressed with descriptions based on economic reasoning or logic. This tendency to disagree results in part from an effort, conscious or otherwise, to sustain tax legislation when possible by confining the restrictive effect of the uniformity provisions to a few taxes. There is little benefit to be derived from joining the battle of words here except to point out the chief area of agreement: that a tax levied directly against property according to value based on some form of assessment is a property tax. If the legislation involves something more than a property tax in its simplest form there is always the possibility that it will be labeled non-property Such marginal taxes, capable of being categorized either way, are best understood when removed from the problems of uniformity peculiar to property taxation, and are considered here only when necessary to discuss some particular point.

SECTION 2.

The General Property Tax

The general property tax is founded on the simple rule that all property should be taxed at the same rate according to value, but in

application of the rule difficulties arise because of the heterogeneous nature of property interests. Thus the effect of the uniformity provisions is best portrayed in cases presenting questions of classification and assessment of property That is to say· problems in uniformity may occur in the way the tax is levied or the way it is assessed, since a statute taxing property may be attacked for want of uniformity on the contention that its rate or valuation is unequal on the same or different kind of property, or that the assessment made does not apply alike to all property On the former theory the power of the legislature to classify is the crucial point, while on the latter the validity of a particular assessment is the major issue. It seems to make little difference whether the constitution calls for a uniform rule, a uniform rate or a levy according to value, because all have been applied in a strict or liberal manner at one time or the other. The same is true whether the meaning of value is taken to be full value, partial value, actual value, market value, cash value, or average value. The traditional position of the courts coincides with the underlying philosophy of the general property tax, and a number of states still require property to be taxed at the same rate according to value.[110] Many, however, permit the classification of property on one ground or another.[111] Modification of the classical rule has taken place through amendments which limit the effect to uniformity within the class, and by decisions allowing varying degrees of freedom in the power to classify The latter method includes the technique of exempting certain property altogether where the language of the constitution is indefinite, thereby permitting classification as to taxability if not as to rate.[112] Also utilized is any reference in the constitutional expression of the rule to species or kinds of property which will support a finding that the legislature's power is commensurate with its ability to draw fine distinctions in this respect. Both methods have been sufficiently pronounced to make the current problem in uniformity of property taxation primarily one of choosing between a strict and liberal rule.

One of the best comparisons in the effect of the two rules was made in the opinion of a Montana case, *Hilger* v *Moore*,[113] decided in 1919. It so happened that the constitution of Montana contained two relevant uniformity provisions, each of which exists alone in a number

[110] Berryman v. Bowers, 31 Ariz. 56, 250 Pac. 361 (1926); Mahoney v. San Diego, 198 Cal. 388, 245 Pac. 189 (1926); Sherlock v. Winnetka, 68 Ill. 530, 59 N. E. 791 (1900).

[111] Pullman Car Corporation v. Hamilton, 229 Ala. 184, 165 So. 616 (1934); Attorney General v. Avon Park, 108 Fla. 641, 149 So. 409 (1933); Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203 (1930); Union Tank Car Company v. Day, 156 La. 1071. 101 So. 581 (1924); Opinion of the Justices, 133 Me. 50, 173 Atl. 816 (1935).

[112] Pullman Car Corporation v. Hamilton, 229 Ala. 184, 155 So. 616 (1934).

[113] 56 Mont. 147, 182 Pac. 477 (1919).

of state constitutions. The first provided that the legislature should levy "a uniform rate of assessment and taxation, and prescribe such regulations as shall secure a just valuation for taxation of all property"[114] The second provided that taxes shall be "uniform on the same class of subjects within the territorial limits of the authority levying the tax."[115] The legislation in question made a clear-cut effort to classify property so that all taxable property in the state would be placed in seven separate categories and each category assessed at a different percentage of full value. The plaintiff, a personal property owner, computed his tax according to the percentage applicable to the appropriate class, tendered the amount due, and, when the county treasurer assessed the property at its full value, began an action to restrain him from seizing it for sale. He contended the legislature had a clear power to establish the class under which he benefited, and relied on the second constitutional provision set out above. The defendant argued such power was denied by the first provision, and that the second provision referred to classes of persons only Here was a rare chance to apply one of two constitutional provisions on the basis of their effect on the legislative power to classify property The court made the most of its opportunity by pointing out initially the significance of applying a strict rule:[116]

> "Fifty years ago, and prior thereto, the rule was generally understood to require nothing more or less than this: If A and B each owned taxable property of the same value within the same taxing district, each should pay thereon precisely the same amount of tax, without reference to the character of the property. The rule as thus understood is designated the 'uniformity rule of general property taxation' It cannot be open to argument that a provision of this character does not admit of classification of property for the purpose of taxation. The meaning is too plain to admit of doubt."

Then, equal attention was given to the theoretical advantages to be gained from classification in the following words:[117]

> "In theory, the doctrine of classification seeks to remove the temptation to dishonesty in returning property for assessment; to shift the burden of taxes from property, as such, to productivity, or in other words, to impose the burdens of government upon property in proportion to its use, its productivity, its utility, its general setting in the economic organization of society, so that everyone will be called upon to contribute according to his ability to bear the burdens, or as nearly so as may be, and to relieve administrative officers from the apparent necessity of continuing the legal fiction of full valuation in the face of contrary facts."

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[114] For similar provisions see Table I, which appeared as an appendix to the first article.—38 Ky. L. J. 69.

[115] *Ibid.*

[116] Hilger v. Moore, 56 Mont. 147, 182 Pac. 477 479 (1919).

[117] *Id.* at 151, 182 Pac. at 483.

In making its choice the court felt constrained to rely on a precise and technical construction of the constitution in light of other provisions pertaining to taxation generally, plus the usual technique of turning to the intention of the framers; but it sustained the tax on the ground that the strict rule had never applied in Montana. The provision calling for a uniform rate of assessment and taxation was construed to require a uniform mode of assessment only to the end that a just valuation of all taxable property would be secured. Such a construction was considered essential to the interpretation given the second provision that the word "subjects" included property, and that property could be classified for the purpose of taxation. In the opinion of the court, the instant legislation had nothing to do with either the assessment of property or the determination of the rate of the tax levy, so it violated no part of a uniformity rule derived from a combined construction of the two provisions to the effect that: "the legislature shall prescribe such uniform mode of assessment as shall secure a just valuation of all taxable property, and all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax."[118] The court was influenced by other sections of the constitution permitting the state board of equalization to adjust valuations between different classes of taxable property, establishing an artificial and arbitrary rule for the taxation of certain mining property, and recognizing the right of the legislature to impose a tax on livestock in addition to that borne by other property It was not impressed with defendant's further contention that the classification violated the Fourteenth Amendment. Although the real importance of the *Hilger* case lies in its clear portrayal of the effect of two kinds of uniformity, it should be noted in passing that the court made an enlightened choice however strained its logic may have been in reconciling the language of two incompatible provisions in the same constitution.

It is extremely difficult to generalize about the two positions illustrated in the *Hilger* case. It has been said in interpreting the more liberal rule that property may be classified with reference to its kind or use provided there is a reasonable ground of demarcation, but that taxability cannot depend on a classification of owners;[119] while jurisdictions which adhere to stricter standards may find that the taxpayer can be classified but not property [120] There seems to be more reluctance to deviate from a narrow interpretation in the case of real property, probably on the theory that there is less occasion for finding

[118] *Id.* at 149, 182 Pac. at 481-482.
[119] Opinion of the Justices, 84 N. H. 559, 569, 149 Atl. 321, 326 (1930).
[120] Ames v. People, 26 Colo. 83, 56 Pac. 656 (1899).

valid distinctions as to kind or species. Thus it is found that a statute taxing unimproved land in a city at a lower rate than property in a built-up section is void under the uniformity clause,[121] and a tax of three cents per acre on land where mineral deposits are owned by another than the surface owner is invalid because of unreasonable classification.[122] In the latter case the North Dakota court held that a provision requiring uniformity within the class did not preclude the legislature from levying a tax differently on different classes of property, but that a distinction based on ownership was unreasonable. It distinguished an earlier case sustaining a graduated tax on automobiles on the ground that classification as to horsepower was a difference based on the character of the property and reflected a concern for value. It was said of the immediate legislation that land containing valuable and worthless mineral deposits were treated alike, and the owner of very valuable mineral reserves could limit his tax liability to three cents an acre by organizing a corporation and selling it the surface or mineral rights.[123]

Pennsylvania, where the constitution first permitted uniformity within a class, has manifested a similar interest in the element of value. There a floor tax was levied on all whiskey stored at a particular time according to a specified rate per gallon without concern for a difference in market value because of age. In holding the tax unconstitutional, as one on property levied without consideration of value, the court said: "Whether the thing taxed is a quantity of liquor or a quantity of land makes no difference; each is property and a tax to be uniform must operate alike on the classes of things or property subject to it."[124] No attention was given to the fact that the inequality was one of result rather than method. On the other hand, Minnesota has interpreted a similar provision so as to allow varying rates of assessment on iron ore property, platted realty, and unplatted realty;[125] and New Hampshire permits trees to be classified and taxed at a different rate.[126] There the legislature was advised that a statute exempting all standing trees of less than a fixed diameter and classifying the remainder with respect to such diameter would not be in violation of uniformity within the class.

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[121] Monaghan v. Lewis, 21 Del. 218, 59 Atl. 948 (1905).

[122] Northwestern Improvement Company v. State, 57 N. D. 1, 220 N. W 436 (1928).

[123] *Id.* at 8, 220 N. W. at 439.

[124] Commonwealth v. Overholt, 331 Pa. 182, 191, 200 Atl. 849, 853 (1936).

[125] Apartment Operator's Association and Another v. City of Minneapolis and Others, 191 Minn. 365, 254 N.W 443 (1934).

[126] Opinion of the Justices, 84 N. H. 557, 149 Atl. 321 (1930).

SECTION 3.

The Importance of Value

The single thread of consistency in these cases seems to be the court's preoccupation with the decisive importance of value. The North Dakota mineral rights case and the Pennsylvania floor tax decision turned on this point, while the classification allowed in Minnesota and New Hampshire was based on distinctions traceable to physical conditions enhancing the value of the property such as the platting of land and the size of trees. This fact is not surprising when it is remembered that taxation according to value long has been the most universal test for measuring equality in property taxation. The test was given constitutional expression in many states,[127] and some even use the adjectives property and *ad valorem* interchangeably in describing a tax. Under the classical rule all property had to be taxed according to value, and the criterion apparently has been carried over even where uniformity is limited to a class.

It is not so clear whether property can be classified on the basis of value. Many attempts to graduate probate fees according to the value of the estate have been invalidated on the theory that the tax was one on property,[128] and the same fate has been met by income taxes, taxes on gross receipts, and others as will be seen later. Under a theory that uniformity is no more restrictive on the power to classify than equal protection, however, there seems to be no logical reason why such a basis should not be reasonable. At least there is little justification for keeping uniformity irrevocably tied to value beyond the archaic fiscal doctrine underlying the general property tax that an ad valorem system of property taxation is essential to an equal distribution of the expenses of government. The question is a basic one in the entire uniformity problem, appearing in all its phases, and not capable of final solution here. Questions of uniformity in rate, for instance, rest in part on a comparison of rate in terms of property value.

In *Pingree* v *Auditor General*,[129] the Michigan court was asked to sustain a statute which provided for taxing the telegraph and telephone lines of a telephone corporation at the average rate of all taxes

[127] For a listing of constitutional provisions by states see Table I, which appeared as an appendix to the first article.—38 Ky. L. J. 69.

[128] Berryman v. Bowers, 31 Ariz. 56, 250 Pac. 361 (1926); Chapman v. Ada County, 48 Idaho 632, 284 Pac. 259 (1930); Cook County v. Fairbank, 222 Ill. 578, 78 N.E. 895 (1906); Hauser v. Miller, 37 Mont. 22, 94 Pac. 197 (1908); Malin v. Lamoure County, 27 N. D. 140, 145 N.W. 582 (1914); Smith v. Carson City, 90 Utah 560, 63 P 2d 259 (1936).

[129] 120 Mich. 95, 78 N.W 1025 (1899).

raised for all purposes. It was agreed by all concerned that the tax was one on property, and not a "specific" tax under Michigan's peculiarly worded constitutional provision, therefore the court found that it violated the strict rule of uniformity It was said in part:[130]

> "It is assessed according to cash value which is a compliance with section 12, but the fact remains that the rate is determined in a different way, and is different in amount from taxes imposed on other property which contributes to state taxes. Taxes generally assessed for the State bear a proportion to the amount to be raised, and all taxable property is charged with a given and equal percentum upon its assessed value. That cannot be said of this property."

In other words, uniformity means not only in relation to value, but also that the rate must be absolutely equal between all property

In contrast Louisiana has sustained a statute containing a strikingly similar statutory provision.[131] There it was contended, *inter alia*, that a statute taxing the tank cars of a nonresident corporation at the average rate of local taxes on the tank cars of resident corporations was a violation of the state constitutional provision that "all taxes should be uniform upon the same class of subjects." The court said, briefly:[132]

> "It would be difficult to conceive a more uniform state tax in lieu of local taxes than that which is based upon the general average of local taxes, widely varying in rates, and which is imposed upon all tank cars owned by non-resident and undomiciled owners.
>
> The record establishes the fact that plaintiff is taxed in substantial uniformity with other property holders throughout the state, and this is all that the law requires."

To this extent at least, Louisiana's liberal application of uniformity would require only a substantial equality between property of apparently the same kind and value, while in Michigan the concern for taxation according to value is reflected in a strict uniformity of rate. Of course the constitutional provisions were different and the court in the former case talked in terms of a tax levied directly against the property, while in the latter it was conceived as reaching the property through the owner; but comparative equality according to value was the actual basis for requiring absolute uniformity in one, and substantial uniformity in the other.

Practical defects in the ad valorem system show up best in the administration of the general property tax because of inequality in assessments, particularly in those jurisdictions where little or no deviation is made from a strict and ad valorem rule of uniformity Here

[130] *Id.* at 102, 78 N.W. at 1027.
[131] Union Tank Car Company v. Day, 156 La. 1071, 101 So. 581 (1924).
[132] *Id.* at 1079, 101 So. at 584.

uniformity functions as a basis for testing the validity of a particular assessment made in administering the tax. Under a strict interpretation of the rule the taxpayer usually contends that the uniformity requirement is violated because his property was not debased to the same level as other property in the taxing district in determining its assessed value, or that his property was overvalued. Also, he may contend that there is a discrimination between classes brought about by the assessment of some other class at a lower level, or its omission from the tax roll entirely

As far as the first contention is concerned if it is the general practice in a taxing district to assess property at less than its full value, the uniformity provision will be invoked to assure the similar debasement of all property [133] This is particularly true where the provision expressly calls for taxation according to value. In view of the regularity with which the courts have granted relief where this type of discrimination is shown, it is hard to account for the result in the case of *Illinois & St. Louis Railroad & Coal Company* v *Stookey.*[134] There the state equalization board assessed a railroad's property at approximately its fair cash value, and the tax was levied by the local authorities on that basis. When the railroad sought an injunction on the contention that all other property in the taxing district was assessed at only one third of its actual value, it was refused on the ground that the mere fact the local assessor had failed to comply with the law requiring assessment at fair cash value did not invalidate the assessment made by the equalization board. That such a holding is inconsistent with the position normally taken by jurisdictions applying classical uniformity in matters of assessment is clearly shown by a subsequent Illinois decision made on similar facts. In *People* ex rel. *McDonough* v *Grand Trunk Railroad Company,*[135] it was held that the assessment by the State Tax Commission of a railroad's property at sixty per cent of actual value, whereas other property in the county was assessed at only thirty-seven per cent, was a valid defense to a suit for delinquent taxes.

On the other hand, if the jurisdiction has modified its rule of uniformity, such an assessment of railroad property at a different percentage of value may be allowed. Thus it was held as early as 1899 in Colorado that a provision requiring uniformity within the class conferred the power to classify property and prescribe various methods for ascertaining value, which included the right to provide a different

[133] Aldrich v. Harding, 340 Ill. 354, 172 N.E. 772 (1930).
[134] 122 Ill. 356, 13 N.E. 516 (1887).
[135] 357 Ill. 493, 192 N.E. 645 (1934).

method for valuating railroad property;[136] and Wisconsin has found more recently that its uniformity rule does not prevent the assessing and taxing of public utilities differently from other property[137]

Under a strict rule of uniformity overvaluation of one taxpayer's property, while property generally in the same district is correctly valued, seemingly violates the constitutional mandate just as much as does the failure to debase his property to the same level as that of other taxpayers. The result in both cases is to require the taxpayer to pay a greater proportion of taxes according to the value of his property than taxpayers generally In such a situation, however, the courts are more hesitant about granting relief. Before a taxpayer can be heard to defend upon the ground that his property has been overvalued, or before he can secure an injunction restraining collection on that ground, he must show that he has exhausted his administrative remedies, or that, if the board of review has refused to grant him a hearing, he has sought by mandamus to compel them to do so.[138] Even in the taxpayer has availed himself of all the remedies provided by the statutes, the court may say that it will not grant relief unless he can prove that the overvaluation was made by the assessor for some corrupt or illegal motive, or that the assessment is so grossly excessive as to amount to constructive fraud.[139] The theory underlying such a position is that the court is not an assessment body, or at least that it cannot determine the assessment for property owners not before the court.

The same difficulty as to remedy occurs where the contention is made that a discrimination between classes results from the alleged omission or underassessment of other property The simplest situation of this nature is where the assessor has omitted the property of one or a few taxpayers, and it seems well settled that such omission, whether inadvertent or intentional, will not affect the validity of the tax upon other taxpayers who have been properly assessed.[140] The complaining taxpayer is left to seek compensation in damages where the omissions are made willfully and corruptly, or resulting from gross negligence, and where injury has been suffered. As an alternative, he can mandamus the assessing officer to compel them to place the omitted or underassessed property on the assessment rolls at the proper value. This hardly amounts to classification, but if the omis-

[136] Ames v. People, 26 Colo. 83, 56 Pac. 656 (1899).

[137] Light Company v. Tax Commission, 207 Wis. 523, 242 N.W 312 (1932).

[138] For a general discussion see Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies,* 28 MICH. L. REV. 637 (1930).

[139] See Comment, *The Illinois Constitutional Requirement of Uniformity in Taxation,* 33 ILL. L. REV. 57, 67 (1938).

[140] *Id.* at 69.

sions involve large amounts of certain kinds of property, such as personalty, and occur rather continuously, a kind of administrative classification does result. The obvious breakdown of the narrow concept of uniformity at this point led to the first major break with the classical rule and resulted in many of the first attempts to classify property

SECTION 4.

Classifying Property

A statute classifying property on the basis of the clearest distinction possible, real and personal, may be unconstitutional for want of uniformity in one jurisdiction and valid in another.[141] The former decisions take the questionable view that all property is homogeneous for the purpose of taxation, and that exemption or classification of one kind of property creates an undue burden on the type of property taxed. The fact that insurmountable difficulties in reaching and assessing personal property may cause gross inequality is ignored in the strict application of a narrow constitutional mandate. A more tenable position is taken by those jurisdictions which have profited by experience and amended the constitution, as is well shown in the Ohio case of *State* v *Davis*,[142] where it was contended that failure of the state tax commission to include the property, other than real estate, of interurban railroad companies on the general tax list was a violation of uniformity The argument was made in spite of a recent constitutional amendment clearly limiting the uniformity rule to "land and improvements thereon."[143] The court took some pains in denying the contention to show how the Constitution of 1851 prevented classification with a provision requiring "all property within the limits of a taxing district to be taxed by a uniform rule," but that the amended provision clearly permitted classification into real and personal property; and further, that the latter could be subclassified subject only to the limitations of the Fourteenth Amendment to the Federal Constitution.[144]

The position taken in the Davis case was possible because of the constitutional amendment, but can be reached in the absence of specific revision as indicated by the finding in a comparatively recent Alabama decision. There the court, in *Pullman Car and Manufactur-*

[141] Mahoney v. San Diego, 198 Cal. 338, 245 Pac. 189 (1936); Opinion of the Justices, 208 Mass. 616, 94 N.E. 1043 (1911); State v. Drutteschmitt, 4 Nev. 178 (1868).
[142] 132 Ohio St. 555, 9 N.E. 2d 684 (1937).
[143] *Id.* at 559, 9 N.E. 2d at 686.
[144] *Id.* at 560. 9 N.E. 2d at 688.

ing *Corporation of Alabama* v *Hamilton,* quoted with approval from the opinion in an earlier case as follows:[145]

> "The rule that all taxes, levied on property in this state, shall be assessed in exact proportion to the value of such property was extended to personal property and incorporated in the Constitution in 1868. The purpose and scope of this constitutional limitation on the taxing power was designed to secure uniformity and equality by the enforcement of an ad valorem system of taxation and to prohibit arbitrary or capricious mode of taxation without regard to value. *This does not mean that all property must be taxed. Nor does it prohibit exemptions from taxation or such classifications of property as are not purely arbitrary, capricious or without the semblance of reason."*

Any differene between the Ohio uniformity provision of 1851, and Alabama's of 1868, is hardly discernible to the objective eye, but in both the *Davis* and *Pullman* cases the power of the legislature to levy against real property and personal property by distinct standards not only is recognized but is considered desirable, in sharp contrast to the frequent demand for strict uniformity

The classification of intangibles presents the courts with a similar problem in the uniformity of property taxation. The need for such a distinction in applying the general property tax stems from the same background surrounding the administration of a tax on all personal property The whole history of property taxation is full of ingenious efforts to bring property elusive to assessment within the effective control of the assessing authority Assessing of intangibles at a lower rate and exempting them from other taxation with the expectation that tax evasion will be decreased by voluntary declarations, and the amount of revenue increased thereby, is the remedy most often attempted. Where a strict rule of uniformity is applied this remedy is defeated at its inception.

An *Opinion of the Justices*[146] in Massachusetts, for instance, leaves little doubt as to the effect of the constitutional provision if so construed. The proposed tax exempted from all other taxation, state and local, classes of intangible personal property including money on hand, on deposit, or at interest, other debts due the taxpayer, public stocks and securities, bonds of domestic and foreign corporations, and shares of capital stock of foreign corporations; and imposed thereon a property tax at the rate of three mills on each dollar of the fair cash value. The relevant constitutional provision differed somewhat from the usual wording by stating that the general court was empowered "to impose and levy proportional and reasonable assessments, rates, and

[145] 229 Ala. 184, 155 So. 616 (1934).
[146] 195 Mass. 607 84 N.E. 499 (1908).

taxes upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth."[147] The Justices ruled that property could not be classified, saying:[148]

> "The general purpose of the constitutional provisions above quoted is to put the burdens of government equally upon all the people, in proportion to their ability to bear them. The provision requires that all taxes levied under its authority be proportional and reasonable, and forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is affected directly in the assessment or indirectly in the valuation through arbitrary and unequal methods
>
> "The natural effect here would be to diminish the amount of property taxable at the regular rate, and to impose upon the exempted property a tax hardly more than one fifth of the average rate in the cities and towns of the Commonwealth. The only plausible argument to the contrary is that, because of the difficulty of enforcing the law in the taxation of intangible property, much of it goes untaxed, and the proposed exemption of it in part would be likely to produce greater returns from it than are obtained under the present system. We do not think that this conjecture, justifies a method of taxation which is necessarily, and by intendment, very disproportional."

That the fate of an intangibles tax is not so ignominious in every state is revealed by its history in Washington, as described in *State* ex rel. *Atwood* v *Wooster*[149] Prior to the adoption of a constitutional amendment in 1930, the Washington courts had interpreted a provision reading, "The legislature must provide for a uniform and equal rate of assessment and taxation on all property according to its value", to mean that mortgages, bonds, warrants, and other like intangibles might be classified by the legislature as credits and so escape direct taxation, but that money could not be.[150] Subsequently, the constitution was changed to read: "All taxes should be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only" In upholding a tax which exempted money and other enumerated intangibles, the court said in the instant case:[151]

> "The constitutional provision upon which the two previous cases were decided were entirely swept away by the amendment of 1930, and in their place we have something distinct and different. What was the purpose of this drastic change? A fair answer is to be found in the Permenter case where it is said:

[147] *Id.* at 608, 84 N.E. at 500.
[148] *Id.* at 609, 84 N.E. at 501.
[149] 163 Wash. 659, 2 P 2d 653 (1931).
[150] State *ex rel* Wolfe v. Permenter, 50 Wash. 164, 96 Pac. 1047 (1908); Egbert v. Gifford, 151 Wash. 43, 275 Pac. 74 (1929).
[151] 163 Wash. 659, 2 P 2d 653, 662 (1931).

> " as a matter of common knowledge one of the most fruitful sources of inequality in taxation is the attempt to tax credits. Laws for that purpose can never be effectively enforced. Efforts to conceal the existence of credits are so successful that a few honest persons pay the taxes and the large majority of holders do not. These were the evils sought to be eradicated and abolished, and to that end the requirements that a uniform tax be assessed against all property were swept away, and in their place were adopted constitutional provisions which say nothing about uniformity, and do not provide that all property shall be taxed but which do provide that all taxes shall be uniform upon the same class of property."

Under the position illustrated by this case, the legislature, freed from former limitations, may determine what property shall be taxed, the different rates upon which different classes of property shall be taxed and what property shall pay no tax at all, subject only to the limitations found in the newer type of constitutional provisions. On this point the Washington court found there was nothing unreasonable in classifying intangibles because "all are of the same fugitive character, permitting of ready concealment when an attempt is made to tax them, resulting in nonenforcement and in inequality"[152] In sustaining a similar tax in *State Tax Commission* v *Shattuck*,[153] the court of Arizona pursued this theme to its ultimate conclusion that classification need not be based on "essential differences in the physical nature of conditions of the subjects of taxation, but may be based on want of adaptability to or impracticability of applying the same method of taxation, or on well grounded considerations of public policy"[154]

As between the Massachusetts and Washington method there can be little doubt the latter achieves a more practical equality As will be shown later,[155] freedom of classification comparable to that allowed in the *Wooster* case could be permitted in some jurisdictions by construing the tax in question as an excise, or by permitting the taxation of income from intangibles under an income tax; however, other constitutional limitations may prevent the legislature from reaching intangibles except through the method of low rate segregation in the general property tax. In Michigan, for instance, the so-called Fifteen Mill Amendment raises serious doubts as to the constitutionality of taxing intangibles under some form of an income tax,[156] and the result would be the same where the general income tax is clearly unconstitutional. If a true equality of burden in taxation is to be realized in

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[152] *Id.* at 664, 2 P 2d at 655.
[153] 44 Ariz. 379, 38 P 2d 631 (1934).
[154] *Ibid.*
[155] See discussion in Chapter VI which will appear in the March, 1950 issue.
[156] Ford. *Some Aspects of Intangibles Taxation in Michigan,* 37 MICH. L. REV. 893, 895 (1939).

attaining the ultimate objective of the uniformity provisions, it is imperative that they be applied with a full understanding as to the heterogeneous character of modern property interests. Of these, intangible personalty is least amenable to general property taxation.

SECTION 5.

Uniformity Within a Class

The ability to classify property to the extent illustrated in the personalty and intangibles cases does not solve all the difficulties in the legislature's path in taxing personal property uniformly for the leeway described in the *Shattuck* case is not always granted in finding a tax uniform within the class or uniform on the same species of property While it is usually agreed that a valid classification must be reasonable rather than arbitrary, and cannot be based on caprice, whim, or fiction, still what constitutes a distinct kind of property or a permissible ground for discrimination in rate often is problematical. The question occurs more frequently in non-property taxation where graduation features based on quantity of income, volume of business, value of an estate, et cetera, are involved, but interesting situations do arise where the tax is found to be one on property

Taxing of bank stock as distinguished from other intangibles is a problem in point. In the absence of specific constitutional provisions to the contrary it may be permissible to tax the stock of banking institutions or other corporations differently on the strength of what has been called "inherent characteristics which so differentiate them from all other kinds of taxable property as to take them out of ordinary methods of taxation."[157] The reasoning here is no more complicated than that a real difference makes for a real classification. On the other hand, such a theory of institutional characteristics may not be extended to cover a tax on bank stock which allows a national bank stockholder to deduct debts and denies this privilege to a state bank stockholder, because "whenever the legislature levies a tax on property, all property belonging to that species must be taxed at the same rate."[158]

The finely drawn line seems to be that a distinction based on delineation of species is more valid than one which recognizes legal entities. Thus the legislature, in a single statute, may place intangibles into two classes, shares of stock as contrasted with money and credits, but may not tax corporation shares generally at a different rate from

[157] People's Finance and Thrift Company v. Pima, 44 Ariz. 442, 447, 38 P 2d 613 (1934).

[158] State Bank v. Board of Revenue, 91 Ala. 217, 8 So. 852 (1890).

banking, investment, trust and savings company shares.[159] In so holding the Nebraska court was guided by the thought that even though the two rates might result in payment of precisely the same amount of tax on both types of shares, still, since that event would be a matter of chance, the rule of uniformity was violated. The requirement for uniformity was given a liberal interpretation, but not extended to include classification according to fate. This may be as good a solution as any to the court's problem of defining limits to the legislative power. It may, however, put the tax collector in an unenviable position as is shown by the result reached in the remarkable case of *Bank* v *Wilson.*[160] There, in an action to recover taxes paid under protest, a state bank claimed that its capital stock was assessed and taxed at the general personal property rate while money and credits in substantial amounts employed and used in the same line of business, and coming into direct competition with its capital, were assessed and taxed at a substantially lower rate. The tax collector contended that the tax on money and credits was unconstitutional for want of uniformity and that in fact they were subject to the same rate as other personal property Therefore, assessing capital stock like other personal property did not result in inequality In reversing the lower court, which had sustained a demurrer to the complaint, the South Dakota court found that uniformity within the class permitted the taxing of stock and money and credits at different rates than other property It necessarily followed, in the opinion of the court, that by showing that its shares of stock were taxed at a greater rate than other moneyed capital the state bank could recover the excess tax. In other words, classification based on differences between stocks, money, or credits was a violation of uniformity Logically it would seem that a uniformity rule broad enough to allow the one could be extended to cover the other. In either case the distinctions made relate to the nature or species of the property

Once it is conceded that practical equality can best be served by taxing some property differently from other property, which is the real justification for freedom in classification in the first place, there is little to be gained by adding additional restrictions in the name of uniformity. It has been said that the constitutional requirement for uniformity "contemplates rather than forbids property classification for just valuation,"[161] and that sentiment is quite appropriate here. Such protection against undue discrimination as may be needed can

[159] State *ex rel.* Spillman v. Ord State Bank, 117 Neb. 189, 220 N.W. 265 (1928).
[160] 53 S. D. 82, 220 N.W. 152 (1928).
[161] State *ex rel* Attorney General v. City of Avon Park, 108 Fla. 641, 149 So. 409 (1933).

be found in the concept of equal protection of the laws. To further confuse the already harassed tax collector and taxpayer by spinning superfluous webs of distinction around the phrase "uniform within the class" not only is unnecessary but places an undue emphasis on the function of the uniformity provision as a restriction on the taxing power.

SECTION 6.

Summary

To summarize briefly, few taxes can be characterized as clearly in the nature of property taxes in the sense that all courts will so construe them. It seems clear that a tax levied directly against property according to value based on some form of assessment is a property tax, but the courts are reluctant to so construe a tax because of the restrictive effect of uniformity provisions applicable to property taxation.

With respect to the general property tax, problems in uniformity may occur in the way the tax is levied or the way it is assessed. It seems to make little difference whether the constitution calls for a uniform rule, a uniform rate, or a levy according to value, because all have been applied in a strict or liberal manner at one time or the other. It has been said in interpreting the more liberal rule that property may be classified with reference to its kind or use, but that taxability cannot depend on a classification of owners; while jurisdictions which adhere to stricter standards may find that the taxpayer can be classified but not the property The single thread of consistency in the cases seems to be the court's preoccupation with the decisive importance of value. Actually, there is little justification for keeping uniformity irrevocably tied to value beyond the archaic fiscal doctrine underlying the general property tax that an ad valorem system of property taxation is essential to an equal distribution of the expenses of government. Practical defects in the ad valorem system show up best in the administration of the general property tax because of inequalities in assessment, particularly where little or no deviation is made from a strict rule of uniformity It was the breakdown of the narrow concept of uniformity at this point which led to the first major break with the classical rule and resulted in many of the first attempts to classify property

A statute classifying property on the basis of the clearest distinction possible, real and personal, may be unconstitutional for want of uniformity in one jurisdiction and valid in another depending on whether the court takes the questionable view that all property is

homegeneous for the purpose of taxation. The consequences of such decisions can be avoided by amending the constitution or by finding that the purpose of uniformity is not to require that all property be taxed, but rather that it contemplates exemptions. Attempts to tax intangibles as property have met with reasonable success in this respect because of their elusive nature and a general realization that they must be classified if they are to appear on the assessment rolls at all. Even here, a court occasionally will apply the uniformity provision strictly so as to defeat the manifest purpose of the desirable legislation. A comparatively recent Arizona case goes so far as to suggest that it is not the function of constitutional uniformity to prevent the classification of intangibles even on the basis of "want of adaptability to or impracticability of applying the same method of taxation to them."

Such an interpretation, however, does not solve all the difficulties inherent in applying uniformity to property taxation, for there remains the problem of determining the meaning of uniformity within a class. The question occurs more frequently in non-property taxation where graduation features based on quantity of income, volume of business, value of an estate, *et cetera,* are involved, but interesting situations do arise where the tax is found to be one on property In taxing bank stock, for instance, there seems to be a finely drawn line of distinction based on a delineation of species of property which does not extend to a difference in legal entities. Thus, a Nebraska court has sustained a statute which places intangibles into two classes, shares of stock as contrasted with money and credits, although it will not permit the taxation of corporate shares generally at a different rate from banking, investment, trust and savings company shares. The guiding thought in this instance seemed to be that even though the two rates might result in payment of precisely the same amount of tax on both types of shares, such was a matter of chance and the rule of uniformity was violated.

Once it is conceded that practical equality can best be served by taxing some property differently from other property which is the real justification for classifying property in the first place, there is little to be gained by placing additional obstacles in the legislature's path in the name of uniformity within the class. In addition, such protection against undue discrimination as may be needed can be found in the concept of equal protection of the laws.

(To Be Continued)